

Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

1 JAMES E. TORGERSON(Bar No. 8509120)
2 STOEL RIVES LLP
3 510 L Street, Suite 500
4 Anchorage, AK 99501-1959
5 Telephone: +1 (907) 277-1900
6 Facsimile: +1 (907) 277-1920
7 jetorgerson@stoel.com

JAMES F. RITTINGER
THOMAS J. CAHILL
Admitted pro hac vice
SATTERLEE STEPHENS BURKE &
BURKE LLP
230 Park Avenue, Suite 1130
New York, NY 10169
jrittinger@ssbb.com
tachill@ssbb.com

Attorneys for Defendant
THOMSON REUTERS (Healthcare) Inc.

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ALASKA

12 UNITED STATES OF AMERICA,
13 *Ex rel.* Law Project for Psychiatric
14 Rights, an Alaskan non-profit
15 corporation,

16 Plaintiff,

17 v.

18 OSAMI H. MATSUTANI, MD, et al.

19 Defendants.

Case No.: 3:09-cv-00080-TMB

**OPPOSITION TO MOTION TO
REQUIRE THOMSON REUTERS
(HEALTHCARE) INC. TO PROVIDE
PLAINTIFF WITH DRUGDEX
ENTRIES**

20 **I. INTRODUCTION**

21 Plaintiff PsychRights (Plaintiff) invokes this Court’s time and jurisdiction to try to
22 force Defendant Thomson Reuters (Healthcare) Inc. (TR Healthcare) to give it free
23 access to information that TR Healthcare sells for a nominal fee. Not only is there no
24 justification for shifting Plaintiff’s litigation costs to TR Healthcare, the information
25 Plaintiff seeks would do nothing to rescue the Plaintiff’s deficient False Claims Act
26 (FCA) claims, including its motion for preliminary injunction. Accordingly, Plaintiff’s
27
28

1 Motion to Require TR Healthcare to Provide Plaintiff with DRUGDEX Entries (Motion
2 to Compel) should be denied with prejudice.

3 **II. BACKGROUND**

4 As part of its mission to rewrite the rules of “[m]ainstream medical practice,”
5 Plaintiff has filed this FCA *qui tam* action against an array of defendants, including TR
6 Healthcare, the publisher of the medical reference resource, DRUGDEX.¹ On March 24,
7 2010, Plaintiff filed a motion for preliminary injunction (PI Motion) against state
8 officials William Hogan and William Streur (the State Defendants).² Without reaching
9 Plaintiff’s arguments in the PI Motion, this Court dismissed it without prejudice because,
10 among other reasons, the exhibits attached to the PI Motion did not comply with the
11 applicable rules.³ To cure this defect, despite its agreement with all defendants not to
12 conduct discovery until after June 30, 2010, Plaintiff filed its Motion to Compel TR
13 Healthcare to provide it free copies of certain DRUGDEX documents for its use in
14 preparing an amended PI Motion.⁴

15 But the DRUGDEX documents it seeks are available on Westlaw (offered by TR
16 Healthcare affiliate West).⁵ Plaintiff has an existing subscription to Westlaw.⁶ By
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23 _____
24 ¹ See Complaint, Docket No. 1, ¶¶ 10-41, 85.

25 ² Docket No. 78.

26 ³ March 26, 2010 Order Denying Motion for Preliminary Injunction Without
27 Prejudice (Order), Docket No. 79, at 1-2, 4.

28 ⁴ See Motion to Compel, Docket No. 80, at 3. See also Parties’ First Scheduling
and Planning Conference Report (Report), Docket No. 62, at 2.

⁵ Declaration of Jamie McGrady In Opposition to Motion to Compel (Decl.) ¶ 3.

⁶ Decl. ¶ 2.

1 performing an appropriate search, a typical Westlaw subscriber could obtain access to
2 the 22 DRUGDEX monographs sought by Plaintiff⁷ for approximately \$174.⁸

3 **III. STANDARD OF REVIEW**

4 This Court has wide discretion in controlling discovery.⁹ As a general matter,
5 “[d]iscovery rules are liberally construed to effect the just, speedy, and inexpensive
6 resolution of litigation.”¹⁰ However, discovery is not a substitute for a plaintiff’s own
7 due diligence, and discovery may not be had to obtain information which the requesting
8 party has had ample prior opportunity to acquire, nor where the burden of providing the
9 information outweighs the likely benefit under the circumstances.¹¹

12 **IV. ARGUMENT**

13 Plaintiff’s Motion to Compel should be denied with prejudice. Neither the law
14 nor equity imposes on TR Healthcare an obligation to subsidize the Plaintiff’s litigation.
15 Further, the documents sought would not assist Plaintiff in curing its defective PI Motion
16 or rescue its underlying claims. And Plaintiff’s attempt to conduct discovery in the face
17 of its express agreement to delay discovery until after June 30, 2010 is unjustified.

20 **A. TR Healthcare Has No Obligation to Subsidize the Plaintiff’s 21 Litigation**

22 The Motion to Compel is nothing more than an attempt by Plaintiff to shift its
23 litigation costs to TR Healthcare. The information it seeks is readily available.¹²

24 _____
25 ⁷ Motion to Compel at 1.

26 ⁸ Decl. ¶ 4.

27 ⁹ *Blackburn v. United States*, 100 F.3d 1426, 1436 (9th Cir. 1996).

28 ¹⁰ *Urich v. Fraize*, 2008 WL 801970 at *1 (D. Alaska 2008).

¹¹ *See id.* (citing Fed.R.Civ.P. 26(b)(1), 26(b)(2)(C)).

¹² Decl. ¶ 4.

Stoel Rives LLP
510 L STREET, SUITE 500
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TELEPHONE (907) 277-1900

1 Plaintiff does not need TR Healthcare’s consent or cooperation to get the documents it
2 seeks from DRUGDEX. It simply has to pay for them. Instead of doing so, like any
3 other Westlaw customer would do, Plaintiff is asking this Court to require TR Healthcare
4 to provide the materials for free.
5

6 The information Plaintiff seeks is TR Healthcare’s proprietary information.
7 Selling such information is an essential part of its business. On a broader scale, the
8 taking Plaintiff asks the Court to sanction here – requiring TR Healthcare to give its
9 information to a litigant for free – could threaten TR Healthcare’s business, which
10 involves in considerable part selling such information for a fee.
11

12 Plaintiff can and should do its own research, at its own cost, just like every other
13 litigant. If in the course of doing its research it requires information available through
14 Westlaw, it should be required to pay for that information, just like every other litigant.
15 As another district court recently held,
16

17 Plaintiff may not use discovery as a tool to compel defendants to conduct legal
18 research and provide [it] with results of that research, regardless of how easily and
19 cheaply defendants could do so. . . . Plaintiff’s motion to compel is denied, with
20 prejudice.¹³

21 Plaintiff filed this case in April 2009. Plaintiff could have acquired, at any time
22 before or since then, the 22 monographs it now claims are essential to filing its amended
23 PI Motion – at an approximate cost of \$174. The Motion to Compel should be denied,
24 with prejudice.

25 **B. The DRUGDEX Monographs Would In No Way Assist Plaintiff In**
26 **Curing Its Defective PI Motion**

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28 ¹³ *Glass v. R. Beer, et al.*, 2007 WL 913876 at *9 (E.D. Cal. 2007).

1 As a general matter, a party seeking a preliminary injunction

2 must establish that he is likely to succeed on the merits, that he is likely to suffer
3 irreparable harm in the absence of preliminary relief, that the balance of equities
4 tips in his favor, and that an injunction is in the public interest.¹⁴

5 **1. Plaintiff Has Not, and Cannot, Show That It Is Likely to**
6 **Succeed on the Merits With or Without the DRUGDEX**
7 **Documents It Seeks**

8 Plaintiff cannot show that it will likely succeed on the merits of its preliminary
9 injunction motion for at least two distinct reasons. First, as a matter of law Plaintiff has
10 not shown that injunctive relief is even available to it under the FCA. The purpose of the
11 FCA is to provide money damages – to the United States and to deserving relators.¹⁵ The
12 law creates a narrowly expanded remedy for a terminated *qui tam* whistleblower
13 plaintiff.¹⁶ Such a plaintiff is eligible for “all relief necessary to make the employee
14 whole...”¹⁷ But the Plaintiff is not such a party.

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17 ¹⁴ *McDermott v. Ampersand Publishing, LLC*, 593 F.3d 950, 957 (9th Cir. 2010)
(citing *Winter v. Natural Res. Def. Council*, --- U.S. ----, 129 S.Ct. 365, 374 (2008)).

18 ¹⁵ *See U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir. 1993) (“in the
19 FCA context, Congress has created a scheme in which the interests of the private
20 prosecutor (that is, the relator) coincide with the public interest in remedying harm to the
21 federal treasury [T]he only private interest at stake in a *qui tam* action is the interest
22 which Congress has created in a reward for successful prosecution”); *see also United*
23 *States ex rel. Haight v. Catholic Healthcare West, et al.*, 2008 WL 607150, at *1 (D.
24 Ariz. Feb. 29, 2008) (“the purpose of the False Claims Act is to remedy fraud against the
25 government, not to provide a vehicle for relators to pursue their own agenda”); *United*
26 *States v. Johnson Controls, Inc.*, 457 F.3d 1009, 1017 (9th Cir. 2006) (the purpose of the
27 FCA is to encourage whistleblowers to come forward with information regarding fraud
28 upon the government, while discouraging “‘parasitic’ suits brought by individuals with
no information of their own to contribute”).

¹⁶ *See Bedrossian v. Northwestern Memorial Hosp.*, 409 F.3d 840, 845 (7th Cir.
2005).

¹⁷ 31 U.S.C. § 3730(h) (unlike an ordinary *qui tam* plaintiff, a terminated whistle-
blower employee has the right under the FCA to “all relief necessary to make the
employee whole . . . [including] reinstatement . . .”).

1 The Plaintiff has identified no authority supporting its right to injunctive relief
 2 under the FCA. The only cases cited in Plaintiff's PI Motion as support for the
 3 availability of injunctive relief do not involve the FCA.¹⁸ TR Healthcare has located no
 4 case within this Circuit where injunctive relief was granted to an FCA plaintiff, and the
 5 only case TR Healthcare has found in any jurisdiction involving a private non-
 6 whistleblower relator soundly rejected, on numerous grounds, any possibility of
 7 injunctive relief.¹⁹
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11 ¹⁸ See PI Motion at 8-9 (citing *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997)
 12 (suit by disabled inmates under the Americans With Disabilities Act and the
 13 Rehabilitation Act); *Independent Living Center of Southern California, Inc. v. Maxwell-
 14 Jolly*, 572 F.3d 644 (9th Cir. 2009) (Social Security Act and the Supremacy Clause);
 15 *F.T.C. v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (Federal Trade
 16 Commission Act).

17 ¹⁹ *U.S. by Dept. of Defense v. CACI Intern., Inc.*, 953 F.Supp. 74, 76 n.2, 79
 18 (S.D.N.Y. 1995). The district court deemed "totally inapposite" an FCA case where the
 19 federal government (not a private relator) obtained an injunction to require court
 20 approval of business transactions by an insolvent defendant, and completely rejected the
 21 relator's attempt to enjoin payments and performance under a federal contract:
 22

23 If the court determines that defendants are indeed defrauding the government, the
 24 civil and treble damages that the government may recover under the False Claims
 25 Act, § 3729(a), will serve to punish the defendants for their fraudulent conduct
 26 and to deter others from doing the same. Pentagen contends that the injunction
 27 would prevent defendants from continuing to "reap the fruits" of false claims and
 28 from "pour[ing] salt on the wound" of taxpayers. However, the court has not
 determined that defendants are guilty and Pentagen has not proven that a FCA
 violation is likely, making this argument purely speculative. Instead of preventing
 FCA violations, the injunction may in fact prevent defendants from making
 progress in their modernization of the Army's computer systems. In addition,
 Pentagen argues that the injunction should be imposed in order to combat private
 citizens' hesitation to bring FCA claims out of fear that nothing will result from
 their actions. The court's refusal to grant an injunction does not mean that nothing
 will come of the suit; indeed, there may be extensive monetary damages awarded
 to the relator which will only serve to encourage private citizen suits.

1 This is a defect that cannot be cured by the 22 DRUGDEX documents Plaintiff
2 seeks at no cost.

3 Second, even if Plaintiff could seek injunctive relief under the FCA, with or
4 without the DRUGDEX documents Plaintiff desires it could not show it would likely
5 succeed on the merits of its PI Motion or its case in chief. Some of the defects in the
6 Plaintiff's suit are set forth in the Memorandum in Support of All Defendants Motion to
7 Dismiss Complaint Pursuant to Civil Rule 9(b) (Memorandum), which TR Healthcare
8 adopts and incorporates in whole in support of this Opposition.²⁰

9 In short, as set forth in the Memorandum, Plaintiff has not even *pled* the merits.
10 Plaintiff has merely assembled "publicly-available data, the names of mental health
11 providers and pharmacy retailers, and certain excerpts from the False Claims Act into a
12 209-paragraph complaint."²¹ In violation of the heightened pleading requirements of
13 Civil Rule 9(b), Plaintiff "does not identify a *single* claim submitted by *any* Defendant
14 that was allegedly false, much less any of the required circumstances of such claims that
15 would provide an appropriate basis to allege fraud."²² No number of free DRUGDEX
16 documents will cure the flaws in the Complaint.

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21 **2. Plaintiff Has Not, and Cannot, Show Irreparable Harm With or**
22 **Without the DRUGDEX Documents It Seeks**

23 The DRUGDEX documents Plaintiff seeks also will not help the Plaintiff show
24 that it will suffer irreparable harm unless the Court grants the preliminary injunction it
25 seeks. The availability under the FCA of monetary relief in the form of double and treble
26

27 ²⁰ Memorandum, Docket No. 84.

²¹ Memorandum at 18.

²² Memorandum at 11-12.

1 damages²³ necessarily makes showing irreparable harm virtually impossible. Put simply,
2 if Plaintiff does not recover money damages in this suit, it is not because there was “no
3 adequate remedy at law,” but because Plaintiff’s action was, and is, wholly disconnected
4 from the purpose and function of the FCA.
5

6 By way of example, Plaintiff’s first basis for asserting irreparable harm in the PI
7 Motion is that the State Defendants, being sued in their official capacities, **may not** be
8 subject to FCA liability under *Stoner v. Santa Clara County Office of Education*.²⁴
9 Relying on another case, *California Pharmacists Ass’n v. Maxwell-Jolly*,²⁵ Plaintiff then
10 concludes that if the State Defendants are not subject to FCA liability and so not liable
11 for monetary damages, “irreparable harm has been established as a matter of law.”²⁶
12

13 This is, of course, twisted logic. If the State Defendants are not subject to liability
14 under the FCA, then they should be dismissed out of this case. Such dismissal would not
15 prejudice or “irreparably harm” Plaintiff; it would merely be the logical outcome of
16 Plaintiff’s failure to state a claim against the State Defendants.
17

18 The FCA was designed to provide money damages. Plaintiff’s attempt to
19 transmute the FCA into a platform for rewriting the rules of “[m]ainstream medical
20 practice” by use of this Court’s injunctive power would turn the FCA into something it
21 was never intended to be and apply it in ways outside the scope of its intended purpose.²⁷
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24 ²³ 31 U.S.C. § 3729(a).

25 ²⁴ *Stoner v. Santa Clara County Office of Education*, 502 F.3d 1116 (9th Cir.
2007), PI Motion, Docket No. 78, at 9-10.

26 ²⁵ *California Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009).

27 ²⁶ PI Motion at 10.

28 ²⁷ *U.S. ex rel. Kelly*, 9 F.3d at 745 (the purpose of the FCA is to provide
“financial and other incentives for private individuals to bring suits under the Act and

(Footnote Continued)

1 Moreover, it should be noted that *California Pharmacists*, the case upon which
2 Plaintiff substantially relies for its showing of “irreparable harm,” did not involve the
3 FCA. The case involved the fee-for-service rate requirements of the Social Security
4 Act.²⁸ The Ninth Circuit affirmed the lower court’s determination that plaintiff hospitals
5 had demonstrated a “likelihood of success on the merits” regarding the state of
6 California’s liability for violating the fee-for-service rate requirements of the Social
7 Security Act.²⁹ The court also found that the plaintiff hospitals had standing by virtue of
8 the direct economic injury they suffered as a result of the state’s noncompliance with
9 federal law.³⁰ While noting that “[t]ypically, monetary harm does not constitute
10 irreparable harm,”³¹ the appellate court concluded that the state’s immunity under the
11 11th Amendment for monetary damages constituted irreparable harm to the plaintiff
12 hospitals sufficient to justify the issuance of an injunction against the state:

13 [W]e are persuaded that because the Hospital Plaintiffs and their members will be
14 unable to recover damages against the Department *even if they are successful on*
15 *the merits of their case*, they will suffer irreparable harm if the requested
16 injunction is not granted.³²

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20 thereby to enlist the aid of the citizenry in combating” fraud against the government, not
21 to assume the government’s role in enforcing its laws; “the fact that relators sue in the
22 name of the United States does not mean that they wield governmental powers
23 [T]he fact that relators sue in the name of the government is significant only with respect
24 to their standing to sue; based on the terms of the statute, in no way does this fact
25 otherwise affect the conduct of qui tam litigation); *see also U.S. ex rel. Taxpayers*
Against Fraud v. General Elec. Co., 41 F.3d 1032 , 1041 (6th Cir. 1994) (“[a]lthough a
relator may sue in the government’s name, the relator is not vested with governmental
power”).

26 ²⁸ 563 F.3d at 849.

27 ²⁹ *Id.* at 850.

28 ³⁰ *Id.* at 850-51.

³¹ *Id.* at 851.

³² *Id.* at 852 (emphasis added).

1 Not only did *California Pharmacists* not involve the FCA, the facts in that case
2 were importantly different than here. Unlike the plaintiff hospitals in *California*
3 *Pharmacists*, Plaintiff has no standing to directly enforce the Social Security Act or any
4 other federal law governing the administration of Medicaid or the practice of medicine in
5 Alaska.³³ Unlike the plaintiff hospitals in *California Pharmacists*, if this Court
6 determines that the State Defendants are not “persons” within the meaning of the FCA
7 and so not subject to liability thereunder,³⁴ Plaintiff will not have been deprived of a
8 remedy or “irreparably harmed” – it will have failed to state a claim.
9
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11 For these same reasons, among others, Plaintiff cannot meet its burden as to the
12 remaining two factors in the preliminary injunction test: whether the balance of equities
13 tips in its favor, and whether an injunction is in the public interest.³⁵ And TR
14 Healthcare’s DRUGDEX documents would not be of any help to Plaintiff in attempting
15 to do so. The Motion to Compel should be denied both because TR Healthcare should
16 not be required to finance Plaintiff’s litigation and because the documents it seeks would
17 make no difference to the resolution of the PI Motion.
18
19

20 **C. Plaintiff’s Motion to Compel Breaches Its 26(f) Agreement With**
21 **Defendants Not to Conduct Discovery Before June 30, 2010**

22 ³³ Plaintiff has standing *qui tam*, if at all, to recover fraudulent claims made
23 against the United States treasury. *See U.S. ex rel. Kelly*, 9 F.3d at 745. For this reason,
24 Plaintiff’s backstop assertion that “allowing continuing violation of federal law
25 constitutes irreparable harm as a matter of law,” PI Motion at 11, makes no sense.
26 Plaintiff is not harmed – it has no standing to directly enforce federal health care laws
27 because it *cannot* be directly harmed – by such “violations.” Moreover, Plaintiff has not
28 demonstrated a likelihood of success on the merits of its FCA claims in the PI Motion
and in the incurably defective Complaint itself.

³⁴ 31 U.S.C. § 3729. *See Stoner*, 502 F.3d at 1121 *et seq.*

³⁵ *McDermott*, 593 F.3d at 957.

1 Plaintiff agreed with all defendants, including TR Healthcare, to delay discovery
2 until after June 30, 2010. Notwithstanding this agreement, Plaintiff now asserts that it is
3 entitled to compel the production of the DRUGDEX documents because it “desires to
4 attach complete documents” to its amended PI Motion.³⁶ While the 26(f) agreement
5 provided that a party could, “for good cause . . . seek variation of the terms [thereof],”³⁷
6 Plaintiff has failed to show such good cause. Fundamentally, what Plaintiff wants is for
7 the Court to require TR Healthcare to perform and pay for Plaintiff’s research, rather
8 than paying for it itself like other litigants do. Its Motion to Compel, an effort to shift the
9 expense of its litigation to TR Healthcare, falls far short of “good cause” for breaching its
10 agreement not to seek discovery. Plaintiff also raises a timing justification, stating that it
11 needs the materials now because it would be too difficult for Plaintiff to refile an
12 amended PI Motion at the same time it is responding to motions to dismiss.³⁸ This
13 reason also falls far short of good cause; the parties’ should be expected to abide by their
14 agreement even when doing so is inconvenient. Further, Defendants’ 9(b) Motion has
15 now been filed so this “reason” is mooted.

20 V. CONCLUSION

21 Plaintiff’s Motion to Compel should be denied with prejudice. If Plaintiff wants
22 DRUGDEX documents, it can find and purchase them just like any other party would

23 ³⁶ Motion to Compel at 4.

24 ³⁷ Report at 2. The 26(f) agreement also provides that Plaintiff may make
25 discovery requests in order to respond to “matters raised by Defendants’ responses to the
26 complaint.” *Id.* Defendants’ 9(b) Motion has been the only such “response” to date, and
discovery with respect to that motion is expressly barred by law. *See Memorandum* at
16-17.

27 ³⁸ Affidavit of James B. Gottstein In Support of Motion for Shortened Time, ¶¶
28 16-17.

Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

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have to do. TR Healthcare should not be required to assist and finance Plaintiff's lawsuit against, among others, TR Healthcare. Accordingly, TR Healthcare asks the Court to deny Plaintiff's Motion to Compel with prejudice.

Dated: April 2, 2010 Respectfully submitted,

STOEL RIVES LLP
Attorneys for Defendant,
THOMSON REUTERS (Healthcare) Inc.

By /s/ James E. Torgerson
JAMES E. TORGERSON (BAR NO. 8509120)
Stoel Rives LLP
510 L Street, Suite 500
Anchorage, AK 99501
Telephone: (907) 277-1900
Facsimile: (907) 277-1920
jetorgerson@stoel.com

Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

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Dated: April 2, 2010

Respectfully submitted,

SATTERLEE STEPHENS BURKE & BURKE
LLP
Attorneys for Defendant,
THOMSON REUTERS (Healthcare) Inc.

By /s/ James F. Rittinger
By /s/ Thomas J. Cahill

JAMES F. RITTINGER
THOMAS J. CAHILL
Admitted pro hac vice
Satterlee Stephens Burke & Burke LLP
230 Park Avenue, Suite 1130
New York, NY 10169
jrittinger@ssbb.com
tachill@ssbb.com

Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the following parties in the method specified below on April 2, 2010:

James B. Gottstein, Esq. Counsel for Plaintiff, Law Project for Psychiatric Rights, ex rel.
jim.gottstein@psychrights.org

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Fred Meyers, Safeway and Southcentral Foundation

Robert C. Bundy, Esq.
bundy.robert@dorsey.com
Michael A. Grisham, Esq.
grisham.michael@dorsey.com

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Kerry Ozer, MD and Claudia Phillips, MD

Allen F. Clendaniel, Esq.
clendaniel@alaskalaw.pro
Carolyn Heyman-Layne, Esq.
Heyman-layne@alaskalaw.pro

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendant, Wal-Mart Stores, Inc.

Jeffrey M. Feldman, Esq.
Feldman@frozenlaw.com
Kevin M. Cuddy, Esq.
cuddy@frozenlaw.com

Served via
 facsimile regular U.S. Mail hand delivery ecf

Tina M. Tabacchi
tmtabacchi@jonesday.com
Eric P. Berlin
epberlin@jonesday.com

Sanford M. Gibbs, Esq. Counsel for Defendants, Lucy Curtis, MD, Hugh Starks and Sheila Clark, MD
akwrangler@aol.com

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Osamu H. Matsutani, MD and Providence Health & Services

Daniel W. Hickey, Esq.
ghlaw3@gci.net
David B. Robins, Esq.
[drobbins@bblaw.com](mailto:drobins@bblaw.com)

Served via
 facsimile regular U.S. Mail hand delivery ecf

Renee M. Howard, Esq.
rhoward@bblaw.com

Matthew K. Peterson, Esq. Counsel for Defendants, Jan Kiele, MD, Elizabeth Baisi, MD, Lina Judith Bautista, MD, and Ruth Dukoff, MD
mkp@cplawak.com

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Ronald A. Martino, MD, Fairbanks Psychiatric and Neurologic Clinic, PC, and Irvin Rothrock, MD,

Linda J. Johnson, Esq.
ljj@cplawak.com
John J. Tiemessen, Esq.
[jtt@cplawak.com](mailto:jjt@cplawak.com)

Lisa C. Hamby, Esq.
lch@cplawak.com

Served via
 facsimile regular U.S. Mail hand delivery ecf

Stoel Rives LLP

510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

- 1 Howard S. Trickey, Esq. Counsel for Defendant, Anchorage Community Mental Health
htrickey@jdolaw.com Services
- 2 Cheryl Mandala, Esq. Served via
cmandala@jdolaw.com facsimile regular U.S. Mail hand delivery ecf
- 3 Richard D. Monkman Counsel for Defendants, Heidi F. Lopez-Coonjohn, MD, Robert
4 dick@sonoskyjuneau.com D. Schults, MD, Mark H. Stauffer, MD, Bartlett Regional
5 Myra M. Munson Hospital Foundation, Inc.
myra@sonoskyjuneau.com
- 6 Served via
 facsimile regular U.S. Mail hand delivery ecf
- 7 Brewster H. Jamieson Counsel for Defendant, Alternative Community Mental Health
jamiesonb@lanepowell.com Services d/b/a Denali Family Services
- 8 Matthew W. Claman Served via
clamannm@lanepowell.com facsimile regular U.S. Mail hand delivery ecf
- 9 Vance Sanders Counsel for Defendant, Juneau Youth Services
10 vsanders@gci.net
- 11 Served via
 facsimile regular U.S. Mail hand delivery ecf
- 12 Matt Peterson Counsel for Defendant, North Star Hospital (corrected from
mkp@cplawak.com Charter North Star Behavioral)
- 13 Linda Johnson Served via
ljj@cplawak.com facsimile regular U.S. Mail hand delivery ecf
- 14 Stacie Kraly Counsel for Defendants, William Hogan, Tammy Sandoval, Steve
Stacie.kraly@alaska.gov McComb, and Bill Streur
- 15 Scott Taylor
Scott.taylor@alaska.gov
- 16 Served via
 facsimile regular U.S. Mail hand delivery ecf
- 17 Howard A. Lazar Counsel for Defendant, Peninsula Community Health Services of
hal@delaneywiles.com Alaska, Inc.
- 18 Served via
 facsimile regular U.S. Mail hand delivery ecf
- 19
- 20 /s/ James E. Torgerson
JAMES E. TORGERSON (Bar No. 8509120)
- 21 Stoel Rives LLP
- 22 510 L Street, Suite 500
- 23 Anchorage, AK 99501
- 24 Telephone: (907) 277-1900
- 25 Facsimile: (907) 277-1920
- 26 jetorgerson@stoel.com
- 27
- 28 70017628.4 0078953-00001

1 JAMES E. TORGERSON(Bar No.
2 8509120)
3 STOEL RIVES LLP
4 510 L Street, Suite 500
5 Anchorage, AK 99501-1959
6 Telephone: +1 (907) 277-1900
7 Facsimile: +1 (907) 277-1920
8 jetorgerson@stoel.com

JAMES F. RITTINGER
THOMAS J. CAHILL
Admitted pro hac vice
SATTERLEE STEPHENS BURKE &
BURKE LLP
230 Park Avenue, Suite 1130
New York, NY 10169
jrittinger@ssbb.com
tachill@ssbb.com

7 Attorneys for Defendant
8 THOMSON REUTERS (Healthcare) Inc.

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ALASKA

13 UNITED STATES OF AMERICA,
14 *Ex rel.* Law Project for Psychiatric
15 Rights, an Alaskan non-profit
16 corporation,

16 Plaintiff,

17 v.

18 OSAMI H. MATSUTANI, MD, et al.

19 Defendants.

Case No.: 3:09-cv-00080-TMB

**DECLARATION OF JAMIE
McGRADY
IN OPPOSITION TO MOTION TO
COMPEL**

20 I, JAMIE McGRADY hereby declare as follows to the best of my knowledge,
21 belief and recollection:

23 1. I am employed as the Alaska Legal Research Consultant for legal publisher
24 West and I offer assistance to West customers in connection with, among other things,
25 Westlaw research services. West as well as defendant Thomson Reuters Healthcare Inc.
26 (TR Healthcare) are owned by The Thomson Reuters Corporation.
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Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

1 2. It is my understanding that James Gottstein -- who maintains a Westlaw
2 account through plaintiff Law Project for Psychiatric Rights (PsychRights) --
3 complains that obtaining access to current DrugDex evaluations is difficult.
4

5 3. However, Mr. Gottstein can obtain access to current DrugDex evaluations
6 (which I understand are published by TR Healthcare) by accessing them through
7 Westlaw's DRUGDEX-EV database contained in the Medical Litigator Premier Library.
8

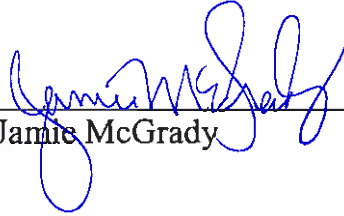
9 4. More specifically, Mr. Gottstein could access the DrugDex evaluations
10 database and be charged on a (i) per search or (ii) time basis. For a charge of \$174, Mr.
11 Gottstein could run a search of the DrugDex evaluations database and obtain access to
12 the evaluations for the 22 DrugDex drugs for which he seeks evaluations.
13

14 5. In addition, subscriptions for unlimited access to the Medical Litigator
15 Premier Library (which includes the DrugDex evaluations database) are available to
16 Westlaw customers such as Mr. Gottstein for \$683 per month.
17

18 6. Thomson Reuters makes available in the ordinary course of its business
19 proprietary information and data (such as information available through Westlaw and, to
20 my understanding, TR Healthcare products and services available through its Medical
21 Litigator Premier Library) that is routinely used and relied upon in litigations. TR does
22 not make its proprietary information and data available for no charge simply because the
23 information or data is alleged to be relevant to a pending litigation by a party in that
24 litigation.
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Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

1 I declare under penalty of perjury that the foregoing is true and correct. Executed
2 on this 1 day of April, 2010.

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5 _____
6 Jamie McGrady
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Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE (907) 277-1900

Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE: (907) 277-1900

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the following parties in the method specified below on April 2, 2010:

James B. Gottstein, Esq. Counsel for Plaintiff, Law Project for Psychiatric Rights, ex rel.
jim.gottstein@psychrights.org

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Fred Meyers, Safeway and Southcentral Foundation

Robert C. Bundy, Esq.
bundy.robert@dorsey.com
Michael A. Grisham, Esq.
grisham.michael@dorsey.com

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Kerry Ozer, MD and Claudia Phillips, MD

Allen F. Clendaniel, Esq.
clendaniel@alaskalaw.pro
Carolyn Heyman-Layne, Esq.
Heyman-layne@alaskalaw.pro

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendant, Wal-Mart Stores, Inc.

Jeffrey M. Feldman, Esq.
Feldman@frozenlaw.com

Kevin M. Cuddy, Esq.
cuddy@frozenlaw.com

Served via
 facsimile regular U.S. Mail hand delivery ecf

Tina M. Tabacchi
tmtabacchi@jonesday.com

Eric P. Berlin
epberlin@jonesday.com

Sanford M. Gibbs, Esq.
akwrangler@aol.com

Counsel for Defendants, Lucy Curtis, MD, Hugh Starks and Sheila Clark, MD

Daniel W. Hickey, Esq.
ghlaw3@pci.net

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Osamu H. Matsutani, MD and Providence Health & Services

David B. Robins, Esq.
[drobbins@bblaw.com](mailto:drobbs@bblaw.com)

Renee M. Howard, Esq.
rhoward@bblaw.com

Served via
 facsimile regular U.S. Mail hand delivery ecf

Matthew K. Peterson, Esq.
mkp@cplawak.com

Counsel for Defendants, Jan Kiele, MD, Elizabeth Baisi, MD, Lina Judith Bautista, MD, and Ruth Dukoff, MD

Linda J. Johnson, Esq.
ljj@cplawak.com

Served via
 facsimile regular U.S. Mail hand delivery ecf
Counsel for Defendants, Ronald A. Martino, MD, Fairbanks Psychiatric and Neurologic Clinic, PC, and Irvin Rothrock, MD,

John J. Tiemessen, Esq.
jjt@cplawak.com

Lisa C. Hamby, Esq.
lch@cplawak.com

Served via
 facsimile regular U.S. Mail hand delivery ecf

Stoel Rives LLP
510 L STREET, SUITE 500
ANCHORAGE, AK 99501-1959
TELEPHONE: (907) 277-1900

- 1 Howard S. Trickey, Esq. Counsel for Defendant, Anchorage Community Mental Health
htrickey@jdolaw.com Services
- 2 Cheryl Mandala, Esq. Served via
cmandala@jdolaw.com facsimile regular U.S. Mail hand delivery ecf
- 3 Richard D. Monkman Counsel for Defendants, Heidi F. Lopez-Coonjohn, MD, Robert
4 dick@sonoskyjuneau.com D. Schults, MD, Mark H. Stauffer, MD, Bartlett Regional
- 5 Myra M. Munson Hospital Foundation, Inc.
myra@sonoskyjuneau.com Served via
- 6 facsimile regular U.S. Mail hand delivery ecf
- 7 Brewster H. Jamieson Counsel for Defendant, Alternative Community Mental Health
8 jamiesonb@lanepowell.com Services d/b/a Denali Family Services
- 9 Matthew W. Claman Served via
10 clamanm@lanepowell.com facsimile regular U.S. Mail hand delivery ecf
- 11 Vance Sanders Counsel for Defendant, Juneau Youth Services
vsanders@gci.net Served via
- 12 Matt Peterson facsimile regular U.S. Mail hand delivery ecf
13 mkp@cplawak.com Counsel for Defendant, North Star Hospital (corrected from
- 14 Linda Johnson Charter North Star Behavioral)
ljj@cplawak.com Served via
- 15 Stacie Kraly facsimile regular U.S. Mail hand delivery ecf
16 Stacie.kraly@alaska.gov Counsel for Defendants, William Hogan, Tammy Sandoval, Steve
- 17 Scott Taylor McComb, and Bill Streur
Scott.taylor@alaska.gov Served via
- 18 Howard A. Lazar facsimile regular U.S. Mail hand delivery ecf
19 hal@delaneywiles.com Counsel for Defendant, Peninsula Community Health Services of
- 20 Alaska, Inc.
Served via
- 21 facsimile regular U.S. Mail hand delivery ecf

20 /s/ James E. Torgerson
 21 JAMES E. TORGERSON (Bar No. 8509120)
 22 Stoel Rives LLP
 23 510 L Street, Suite 500
 24 Anchorage, AK 99501
 Telephone: (907) 277-1900
 Facsimile: (907) 277-1920
jetorgerson@stoel.com

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